Supreme Court, U.S.
FILED
JAN 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-941

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

No. 86-939

ENERGY TRANSPORTATION SYSTEMS, INC.,

Petitioner,

v.

STATE OF MISSOURI, ET AL.,

Respondents.

BRIEF FOR THE STATE OF MONTANA AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED IN NO. 86-941

Whether the Secretary of the Interior may enter into a contract, pursuant to the Federal Reclamation Laws, to supply unutilized irrigation water from a Missouri River mainstem reservoir for industrial use.

QUESTIONS PRESENTED IN NO. 86-939

1. Whether the Court of Appeals improperly substituted its own view for that of the Secretary of the Interior concerning the appropriate construction of the Flood Control Act of 1944.

2. Whether the Secretary of the Interior is authorized under the Flood Control Act of 1944 to contract for the beneficial use of irrigation water stored in the mainstem reservoirs of the Missouri River Basin.

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The State of Montana, through its Attorney General, respectfully appears as *amicus curiae* pursuant to S. Ct. R. 36.4 in support of the petitions for a writ of certiorari in the above matters.

INTEREST OF AMICUS CURIAE

Approximately three-quarters of Montana lies within the Missouri River Basin, and one of that river's six mainstem dams and associated reservoirs, Fort Peck, is located in the northeastern part of the state. Completed in 1940, the Fort Peck facility has a maximum reservoir-storage capacity of approximately 19 million acre-feet--the third largest of the mainstem reservoirs.

In September 1976 the Montana Department of Natural Resources and Conservation (Department) entered into a contract with the United States Department of the Interior, Bureau of Reclamation, which provided, *inter alia*, that a maximum of 300,000 acre-feet of water would be made available for diversion from Fort Peck Reservoir for industrial and other incidental beneficial uses within Montana. Any diversions from the reservoir were to be effected through subcontracts between the Department and entities desiring to utilize the water. Because no such subcontracts were ever reached and because of the Bureau of Reclamation's uncertainty concerning its authority after the decision below, the contract was not extended and

terminated automatically in September 1986. Despite the contract's termination, however, there remains the possibility of substantial industrial development--including the mining of vast coal deposits in the southeastern part of the state--which may in the future make desirable or essential contracts of the kind recently terminated. Indeed, the Montana Legislature recently enacted a comprehensive water leasing program which provides for utilization of waters from, *inter alia*, the Fort Peck Reservoir. 1985 Mont. Laws, ch. 573, § 13, *codified in* Mont. Code Ann. § 85-2-141 (1985). Montana is vitally concerned that the majority opinion below of the Court of Appeals will significantly disrupt the relationship between the federal government and the several Upper Missouri River Basin states, including itself, which has been premised on an assumption that the Bureau of Reclamation possessed regulatory authority over irrigation storage within those reservoirs and that exercise of such authority was governed by section 9(c) of the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, 891.

ARGUMENT

Montana concurs in the petitions filed herein. The decision below reflects not only a construction of section 9(c) which is directly contrary to administrative interpretation and practice but also endangers the very core of the Flood Control Act. The decision accordingly places the entirety of

the Oahe Reservoir storage, and very possibly the storage in the remainder of the mainstem reservoirs, under the exclusive control of the United States Army Corps of Engineers, whose regulatory interest lies largely in nondiversionary use of Missouri River water for flood control, hydroelectric and navigation purposes and whose actions are, unlike those of the Bureau of Reclamation, not subject to federal reclamation laws. The decision will thus effectively vitiate the very underpinning of the Flood Control Act--the shared, coordinate responsibility of the Corps of Engineers and the Bureau of Reclamation unequivocally mandated by the Pick-Sloan plan--for managing the mainstem reservoirs. The flawed nature of the decision's reasoning, together with its importance as to future use of mainstem reservoir waters, clearly merits review.

CONCLUSION

The State of Montana respectfully requests that the petitions for a writ of certiorari in these matters be granted.

Respectfully submitted,

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January 1987